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ONE HUNDRED FOURTEENTH CONGRESS  
**Congress of the United States**  
**House of Representatives**

COMMITTEE ON ENERGY AND COMMERCE

2125 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6115

Majority (202) 225-2927  
Minority (202) 225-3641

May 13, 2016

The Honorable Gina McCarthy  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, D.C. 20460

Dear Administrator McCarthy:

In early February, the Supreme Court granted applications for a stay of the Environmental Protection Agency's "Clean Power Plan." The Court's unprecedented order expressly and categorically stays the promulgated rule. The rationale for this extraordinary action was to save states and other stakeholders from taking actions, expending resources and incurring costs in response to a rule that may not be legal. Yet from the very first weeks following the order, EPA has been taking steps that circumvent the Court's stay and potentially undermine the relief provided by the stay in the first place.

On March 22, 2016, you testified before our Committee that, in response to the stay, EPA has "discontinued our implementation and enforcement of the rule," but that the agency had been and would continue to provide assistance relating to the rule to states that "voluntarily decide to move forward." We now see that, in addition to expending resources to provide "assistance" to individual states, EPA has been expending resources on several regulatory processes that are integrally related to the suspended rule and that would compel states and regulated entities in turn to expend resources to respond to these proceedings—or otherwise forego legal rights—and, indirectly, participate in implementation of the stayed rule.

Two weeks ago, EPA staff advised the Committee that the agency "sent a proposal with details about the optional Clean Energy Incentive Program (CEIP), a component of the Clean Power Plan, to the Office of Management and Budget for interagency review."<sup>1</sup> The CEIP is a program under which EPA would make "Emission Reduction Credits" or allowances available to states to reward early investments in wind and solar energy and demand-side energy efficiency

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<sup>1</sup> See also <http://www.reginfo.gov/public/do/eoAdvancedSearch> (April 26, 2016; RIN 2060-AS84, "Clean Energy Incentive Program Design and Implementation; Pending Review").

projects. This new rulemaking proposal arises directly from the Clean Power Plan and, but for this rule, the new proposal would have no basis. Thus, it is of significant concern that this new rulemaking is proceeding when the underlying rule is categorically stayed.

In addition, the agency has confirmed it is moving forward with its proposed “Model Trading Rules” and other regulatory guidance for implementing the Clean Power Plan.<sup>2</sup> These rules and guidance similarly have no basis independent of the Clean Power Plan. To the extent EPA proceeds with any such actions to implement the stayed rule, it deprives states and other stakeholders the benefits of the stay by compelling participation in regulatory processes that inappropriately assume the validity of a rule that may ultimately be struck down.

Adding to this situation, EPA officials have also stated that certain compliance deadlines in the Clean Power Plan may not be tolled should the stay be lifted—the thrust of which is that states and other stakeholders would be prudent to begin voluntarily preparing now for rule implementation in case its legality is upheld.<sup>3</sup> This “take action or else” messaging underscores indications that EPA, despite the stay, is seeking to coerce additional action to lock in compliance with the mandates of its rule—even if the rule is found to be unlawful.

In sum, the agency’s decision to move forward with a shadow regulatory structure to implement the Clean Power Plan presents several obvious concerns. Continuing to develop a suite of derivative rules and guidance raises questions about whether EPA is complying fully with the Court’s stay order, about what legal authority the agency has to proceed with such actions, about how these actions affect the equities of states and stakeholders, as well as about the agency’s stewardship and use of taxpayer resources.

In light of these concerns, we request additional information to assist the Committee in understanding the agency’s actions and the potential impacts of its actions. Pursuant to Rules X and XI of the U.S. House of Representatives, we ask that you provide written responses and responsive documents to the following requests by May 27, 2016:

1. What is the agency’s legal basis for proceeding with a regulatory proposal to implement the CEIP when the rule establishing this program has been stayed?
2. What statutory provisions does EPA believe authorize it to move forward with derivative regulatory proposals relating to the Clean Power Plan while the stay is in effect?
3. Identify all rulemakings, guidance, directives, or other regulatory actions the agency is currently pursuing that relate to the Clean Power Plan, and the statutory authority for proceeding with each such action.

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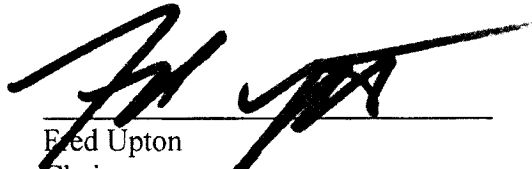
<sup>2</sup> See April 18, 2016 Letter from Janet McCabe, Acting Assistant Administrator for Air and Radiation to the Honorable James Inhofe, available at [http://www.epw.senate.gov/public/?\\_cache/files/ca20cabb-4494-47af-822c-3e814707eb80/epa-response-to-tolling-letter-04-18-2016.pdf](http://www.epw.senate.gov/public/?_cache/files/ca20cabb-4494-47af-822c-3e814707eb80/epa-response-to-tolling-letter-04-18-2016.pdf).

<sup>3</sup> Statements raising uncertainty about tolling if the stay is lifted run contrary to the Solicitor General’s representations to the Supreme Court that the effect of the stay would be to toll all deadlines under the Clean Power Plan. See February 2016 Memorandum for the Federal Respondents available at <http://www.ago.wv.gov/publicresources/epa/Documents/M0117886-1.PDF> at pp. 2-3, 71-72.

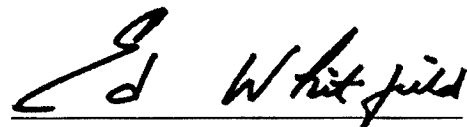
4. Does EPA currently plan to finalize any of these rulemakings, guidance, directives, or other regulatory actions relating to the Clean Power Plan while the stay is in effect? If yes, please identify each such rulemaking, guidance or directive.
5. Have you requested any legal analysis to ensure that the agency has the legal authority to pursue and expend resources on regulatory actions to implement aspects of the Clean Power Plan? If yes, please produce such analysis or analyses to the Committee.
6. Since issuance of the stay, what resources has the agency expended on rulemakings, guidance, and other regulatory actions relating to implementation of the Clean Power Plan?

We appreciate your prompt attention to this request. Should you have any questions, please contact Mary Neumayr or Peter Spencer of the majority committee staff at (202) 225-2927.

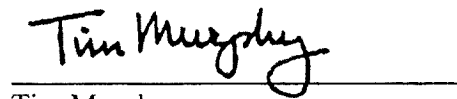
Sincerely,



Fred Upton  
Chairman



Ed Whitfield  
Chairman  
Subcommittee on Energy and Power



Tim Murphy  
Chairman  
Subcommittee on Oversight and Investigations

cc: The Honorable Howard Shelanski  
Administrator, Office of Information and Regulatory Affairs

The Honorable Frank Pallone, Jr., Ranking Member

The Honorable Bobby Rush, Ranking Member  
Subcommittee on Energy and Power

The Honorable Diana DeGette, Ranking Member  
Subcommittee on Oversight and Investigations





## RESPONDING TO COMMITTEE DOCUMENT REQUESTS

*In responding to the document request, please apply the instructions and definitions set forth below:*

### INSTRUCTIONS

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control or otherwise available to you, regardless of whether the documents are possessed directly by you.
2. Documents responsive to the request should not be destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee.
3. In the event that any entity, organization, or individual named in the request has been, or is currently, known by any other name, the request should be read also to include such other names under that alternative identification.
4. Each document should be produced in a form that may be copied by standard copying machines.
5. When you produce documents, you should identify the paragraph(s) and/or clause(s) in the Committee's request to which the document responds.
6. Documents produced pursuant to this request should be produced in the order in which they appear in your files and should not be rearranged. Any documents that are stapled, clipped, or otherwise fastened together should not be separated. Documents produced in response to this request should be produced together with copies of file labels, dividers, or identifying markers with which they were associated when this request was issued. Indicate the office or division and person from whose files each document was produced.
7. Each folder and box should be numbered, and a description of the contents of each folder and box, including the paragraph(s) and/or clause(s) of the request to which the documents are responsive, should be provided in an accompanying index.
8. Responsive documents must be produced regardless of whether any other person or entity possesses non-identical or identical copies of the same document.
9. The Committee requests electronic documents in addition to paper productions. If any of the requested information is available in machine-readable or electronic form (such as on a computer server, hard drive, CD, DVD, back up tape, or removable computer media such as thumb drives, flash drives, memory cards, and external hard drives), you should immediately consult with Committee staff to determine the appropriate format in which to produce the information. Documents produced in electronic format should be organized, identified, and indexed electronically in a manner comparable to the organizational structure called for in (6) and (7) above.

10. If any document responsive to this request was, but no longer is, in your possession, custody, or control, or has been placed into the possession, custody, or control of any third party and cannot be provided in response to this request, you should identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control, or was placed in the possession, custody, or control of a third party.

11. If any document responsive to this request was, but no longer is, in your possession, custody or control, state:

- a. how the document was disposed of;
- b. the name, current address, and telephone number of the person who currently has possession, custody or control over the document;
- c. the date of disposition;
- d. the name, current address, and telephone number of each person who authorized said disposition or who had or has knowledge of said disposition.

12. If any document responsive to this request cannot be located, describe with particularity the efforts made to locate the document and the specific reason for its disappearance, destruction or unavailability.

13. If a date or other descriptive detail set forth in this request referring to a document, communication, meeting, or other event is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.

14. The request is continuing in nature and applies to any newly discovered document, regardless of the date of its creation. Any document not produced because it has not been located or discovered by the return date should be produced immediately upon location or discovery subsequent thereto.

15. All documents should be bates-stamped sequentially and produced sequentially. In a cover letter to accompany your response, you should include a total page count for the entire production, including both hard copy and electronic documents.

16. Two sets of the documents should be delivered to the Committee, one set to the majority staff in Room 316 of the Ford House Office Building and one set to the minority staff in Room 564 of the Ford House Office Building. You should consult with Committee majority staff regarding the method of delivery prior to sending any materials.

17. In the event that a responsive document is withheld on any basis, including a claim of privilege, you should provide the following information concerning any such document: (a) the reason the document is not being produced; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; (e) the relationship of the author and addressee to each

other; and (f) any other description necessary to identify the document and to explain the basis for not producing the document. If a claimed privilege applies to only a portion of any document, that portion only should be withheld and the remainder of the document should be produced. As used herein, "claim of privilege" includes, but is not limited to, any claim that a document either may or must be withheld from production pursuant to any statute, rule, or regulation.

18. If the request cannot be complied with in full, it should be complied with to the extent possible, which should include an explanation of why full compliance is not possible.

19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; (2) documents responsive to the request have not been destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee since the date of receiving the Committee's request or in anticipation of receiving the Committee's request, and (3) all documents identified during the search that are responsive have been produced to the Committee, identified in a privilege log provided to the Committee, as described in (17) above, or identified as provided in (10), (11) or (12) above.

### **DEFINITIONS**

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, interoffice and intra-office communications, electronic mail ("e-mail"), instant messages, calendars, contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, power point presentations, spreadsheets, and work sheets. The term "document" includes all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments to the foregoing, as well as any attachments or appendices thereto. The term "document" also means any graphic or oral records or representations of any kind (including, without limitation, photographs, charts, graphs, voice mails, microfiche, microfilm, videotapes, recordings, and motion pictures), electronic and mechanical records or representations of any kind (including, without limitation, tapes, cassettes, disks, computer server files, computer hard drive files, CDs, DVDs, back up tape, memory sticks, recordings, and removable computer media such as thumb drives, flash drives, memory cards, and external hard drives), and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, electronic format, disk, videotape or otherwise. A document bearing any notation not part of the original text is considered to be a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "documents in your possession, custody or control" means (a) documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, or representatives acting on your behalf; (b) documents that you have a legal right to obtain, that you have a right to copy, or to which you have access; and (c) documents that have been placed in the possession, custody, or control of any third party.

3. The term "communication" means each manner or means of disclosure, transmission, or exchange of information, in the form of facts, ideas, opinions, inquiries, or otherwise, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face-to-face, in a meeting, by telephone, mail, e-mail, instant message, discussion, release, personal delivery, or otherwise.

4. The terms "and" and "or" should be construed broadly and either conjunctively or disjunctively as necessary to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes the plural number, and vice versa. The masculine includes the feminine and neuter genders.

5. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, limited liability corporations and companies, limited liability partnerships, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, other legal, business or government entities, or any other organization or group of persons, and all subsidiaries, affiliates, divisions, departments, branches, and other units thereof.

6. The terms "referring" or "relating," with respect to any given subject, mean anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is in any manner whatsoever pertinent to that subject.

7. The terms "you" or "your" mean and refers to

For government recipients:

"You" or "your" means and refers to you as a natural person and the United States and any of its agencies, offices, subdivisions, entities, officials, administrators, employees, attorneys, agents, advisors, consultants, staff, or any other persons acting on your behalf or under your control or direction; and includes any other person(s) defined in the document request letter.